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No. 87-195

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ANNA PENK, *et al.*,
Petitioners,

v.

OREGON STATE BOARD OF HIGHER EDUCATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE WOMEN'S EQUITY ACTION LEAGUE AND THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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BRIEF OF THE WOMEN'S EQUITY ACTION LEAGUE AND THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

This brief is filed, with the consent of petitioners and respondents, on behalf of the Women's Equity Action League ("WEAL") and the American Association of University Women ("AAUW"), *amici curiae,* in support of the petitioners.

INTEREST OF THE AMICI

Amici are organizations representing memberships at institutions of higher education—both as students and teachers—and with, as part of their organizational purposes, a strong interest in assuring employment equity

for women in colleges and universities across the country. *Amici* have members who have been, or may potentially be, victims of employment discrimination by academic institutions and have been, or may be in the future, involved in litigation seeking to redress that discrimination. As such, *amici* are concerned that consistent, fair, and understandable standards for judging claims of discrimination in higher education be articulated by the federal courts.

Women's Equity Action League (WEAL) is a national, nonprofit membership organization dedicated to securing legal and economic rights for women through research, education, legislative advocacy and litigation.

The American Association of University Women is open to all graduates who hold a baccalaureate or higher degree from a college or university on AAUW's list of qualified institutions. AAUW promotes equity for women, education, and self-development over the lifespan as well as positive social change.

ARGUMENT

I. The 9th Circuit Court of Appeals ruling in *Penk v. Oregon State Board of Higher Education* effectively eliminates the possibility of establishing pattern and practice cases of discrimination on behalf of faculty plaintiffs.

A. *Congress sought to address specific problems of discrimination against women faculty at institutions of higher education wihch persists today.*

Neither of the two major laws prohibiting sex discrimination in employment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, or the Equal Pay Act, 20 U.S.C. 206(d), originally protected faculty members from discrimination by educational institutions. However, a thorough examination of the status of women and minorities in education during 1971 and 1972 convinced

Congress that discrimination in the nation's educational institutions was a serious and pervasive problem. Thus, in 1972, legislation was adopted to protect professional employees of educational institutions from discrimination; Section 906(b)(1) of the Education Amendments of 1972, Pub. L. 920318, 86 Stat. 235 (1972) amended the Equal Pay Act to cover professional executives and administrative employees, and the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972) removed Title VII's exemption for educational institutions.

In Committee deliberations and on the floor, Congress considered a wealth of data reflecting the low status of women in academia. It concluded that:

> Perhaps the most extensive discrimination in educational institutions . . . is found in the treatment of women. While women are generally well represented in terms of numbers employed, they are generally relegated to the lowest paying and least prestigious jobs. 118 Cong. Rec. S1992 (daily ed., Feb. 1, 1972).

and,

> At institutions of higher education, women are almost totally absent in the position of academic dean, and are grossly underrepresented in all other major faculty positions. [T]his discrimination does not only exist as regards to the acquiring of jobs, but . . . is similarly prevalent in the area of salaries and promotions [.] *Id.*, at S1992.

But after two decades of legislative, administrative and courtroom activism, women who pursue academic careers are still nowhere near equal to their male counterparts in salary, career status or job security. Women are underrepresented on faculties, clustered at the lowest end of the teaching ladder and paid considerably less than their male peers.[1]

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[1] *See, e.g.*, "Women Gain Little in Academic Jobs," *New York Times* article, July 23, 1987.

The proportion of women in the postsecondary teaching force increased by only four percent between 1972 and 1980, from 14.4 to 18.1 percent. Astin and Snyer, "Affirmative Action 1972-1982: A Decade of Response," *Change* (July-August, 1982). Even this increase, however, is not reflected in the higher ranks of academia. Indeed, the same patterns of discrimination evidenced prior to 1972 exist today: the lower the rank, the higher the concentration of women in that rank, with women constituting 53 percent of instructors, 38 percent of assistant professors, 25 percent of associate professors, and only 12 percent of full professors of college faculties. *Survey of Salaries, Tenure, & Fringe Benefits of FT Instructional Faculty* (Higher Education General Information Survey), 1985-86 academic year, National Center for Education Statistics, U.S. Department of Education.

Wage disparities also remain a significant problem. For the 1983-84 school year, women on the average were being paid 82 percent of what men receive, throughout all ranks. *Chronicle of Higher Education*, Vol. 25, No. 4, Jan. 18, 1984, at 20. That gap was wider than in 1982-83, *Id.*, Vol. 25, No. 20, Jan. 26, 1983 at 26, and disparities in salary do not appear to be narrowing.

B. *Judicial "deference" to decision-making in academic institutions has severely limited the effectiveness of Title VII for victims of discrimination.*

Prior to the 1972 Amendments to Title VII, courts generally limited their intervention in academic employment matters to cases where there were clear abuses of discretion or arbitrary and capricious actions. *See, e.g., Green v. Board of Regents of Texas Tech University*, 474 F. 2d 594 (5th Cir., 1973).

But even following Congress' 1972 actions, courts expressed great hesitation in subjecting academic employ-

ment decisions to the same scrutiny applied to other employment settings. The opinion of the 2d Circuit in *Faro v. New York University*, 502 F.2d 1229 (2nd Cir. 1974), reflected the view of many courts a decade ago: "[O]f all the fields which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision." *Id.* at 1231-32. *See also Megill v. Board of Regents of State of Florida*, 541 F.2d 1073, 1077 (5th Cir. 1976); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1371 (W.D. Pa. 1977); *EEOC v. Tufts Institute of Learning*, 421 F. Supp. 152, 158 (D. Mass. 1975).

While in many workplaces subjective hiring practices have been recognized as a potential smokescreen for either unconscious or conscious bias, and have been declared "a ready mechanism for discrimination . . .", *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972), in academia such processes are readily affirmed and rarely examined. *See generally*, B. Schlei & P. Grossman, *Employment Discrimination Law* 199-201 (1983).

In *Clark v. Atlanta University, Inc.*, 15 FEP Cases 1138 (N.D. Ga. 1976), *aff'd*, 548 F.2d 353 (5th Cir. 1977), the District Court took the now commonly expressed position that "academic institutions are unquestionably justified in considering many subjective criteria in determining questions of promotion and compensation in the academic world." *Id.* at 1140.

Moreover, courts in academic cases have insisted that they need not—or should not—evaluate the accuracy or fairness of subjective judgments made by academic decision-makers. In *Zahorik v. Cornell University*, 729 F.2d 85 (2d Cir. 1984), plaintiffs, like those in hundreds

of other discrimination cases against non-academic employers, had sought to show that male candidates of equal or lesser qualifications had received more favorable treatment with respect to tenure than plaintiffs. But the District Court and the 2d Circuit in *Zahorik* determined that it was inappropriate for the courts to review the evaluations of concurrent or previous tenure candidates and compare those reviews to those given to plaintiffs, on the grounds that courts cannot hope to master academic fields sufficiently to resolve differences of scholarly opinion about "merit".

The 2d Circuit has, through the *Zahorik* decision, taken from academic plaintiffs the tool of comparative evidence—the backbone of a disparate treatment case. Scrutiny will be weakest in exactly the place where discrimination enters the system—in the evaluation of competence.

The 7th Circuit has even refused to find discrimination when there is evidence that academic standards have not been applied uniformly. In *Namenwirth v. Board of Regents of the University of Wisconsin System*, 769 F.2d 1235 (7th Cir. 1985), the 7th Circuit affirmed a trial court's conclusion that Plaintiff was denied tenure because she was not held in high enough "esteem" by her colleagues. Evidence showed that reasons given for not tenuring the plaintiff were not used when male candidates of similar background and experience were evaluated, and vice versa. The trial court rejected the argument that this was evidence of discrimination with the explanation that "any one person conscientiously engaged in an effort to apply the standard to different tenure candidates over a period of time could reasonably apply the standard somewhat unevenly among the candidates." *Namenwirth v. Bd. of Regents of the University of Wisconsin-*

Madison, No. 80-C-340-G, slip op. at 7 (W.D. Wis. Oct. 27, 1983) (Decision and Order for Judgment).[2]

These cases are not exceptional. The record of success for individual plaintiffs pressing sex discrimination cases in higher education is a dismal one. Academic plaintiffs, to a greater degree even than other "high level" employees, have not received equal protection from Title VII, despite the deliberate step Congress took to cover them. E. Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982).

C. *Yet courts are searching for effective ways to enforce Title VII as Congress intended through analyzing objective proof.*

In more recent years, courts have come to recognize the dangers of the "hands off" approach. The panel in *Namenwirth*, 769 F.2d 1235 (7th Circuit 1985), wrestled with the problem of how to provide effective review of tenure decisions where the dispositive factor is the ability of the candidate to win the esteem of the very people whose sexual biases are in question. The majority concluded that *individual* plaintiffs may be limited to reliance on a procedural flaw or direct evidence of overt, gender-based hostility. *Id.* at 1243. (See, e.g., *Sweeney v. Keene State College*, 604 F2d 106 (1st Cir 1979), *cert denied*, 444 U.S. 1045 (1980); *Fields v. Clark University*, 817 F.2d 931 (1987).

Earlier, in *Davis v. Weidner*, 596 F.2d 726 (7th Cir. 1979), the same Court cautioned that the continued prac-

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[2] *Amici* take strong issue with the conclusion that the high degree of subjectivity involved renders academic decisions impossible to evaluate. In his dissent in *Namenwirth*, Judge Swygert criticized the majority for its excessive deference to subjective decision-making, and suggested that courts trying to ascertain the existence of unlawful bias need not back away from analyzing subjective academic judgments. He outlined a fair and reasonable way to review these decisions in individual cases. *Id.* at 1244.

tice of minimal judicial scrutiny "could lead to the immunization of higher education from the requirements of Title VII." *Id.* at 731. In fact, even the 2d Circuit has since retreated from its opinion in *Faro, supra,* characterizing minimal scrutiny as an "anti-interventionist policy (that) has rendered colleges and universities virtually immune to charges of employment bias, at least when the bias is not expressed overtly." The Court noted specifically that "far from taking an anti-interventionist position with respect to the academy, the Congress has instructed us to be particularly sensitive to evidence of academic bias." *Powell v. Syracuse University,* 580 F.2d 1150, 1154-55 (2d Cir.), *cert. denied,* 439 U.S. 1130 (1978). Thus there is both confusion and an attempt to find adequate judicial solutions to a clear legislative mandate among several circuits.

D. *Increased reliance on statistical evidence as objective proof may be the only means of resolving the dilemma courts have posed for themselves and for academic plaintiffs.*

It is in part because courts have been reluctant to review subjective judgments by academic faculty and administrators that faculty women have sought, in recent years, to bring class action cases. These cases seek to use statistical proof as a means of demonstrating overall patterns of discrimination. *See, e.g., Melani v. Bd. of Education,* 561 F. Supp. 769 (S.D. N.Y. 1983); *Coser v. Moore,* 739 F.2d 746 (2d Cir. 1984); *Chang v. University of Rhode Island,* 606 F. Supp. 1161 (D. R.I. 1985). They represent a hope that courts will see how the subjective standards relied on by colleges and universities create *not a random result,* but a consistent pattern of employment decisions unfavorable to women faculty. By demonstrating the pervasive patterns of failure to pay, promote and grant tenure in comparable numbers, plaintiffs seek to show that employment decisions at many

institutions are not based on fair and consistent application of standards of "scholarly merit", but on sex.

This Court has repeatedly affirmed the value of statistical evidence in demonstrating discrimination. *Teamsters v. United States*, 431 U.S. 324 (1977), *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

And, ironically, it is the 9th Circuit itself which clearly stated the merits of this approach in the academic context. In *Lynn v. The Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), that Court affirmed the wisdom of looking to statistical evidence in academic cases, pointing out that such data "is particularly helpful in the academic context, where the [employment decisions are] highly subjective." *Id.*, at 1342. *Lynn* noted that in determining whether "merit" or "sex" played a greater part in an academic judgment, "Often, there is little direct evidence," so that statistical evidence, which "does not deal with the merits of the university's . . . decision" is a particularly effective method of proof. *Id.* at 1342 n.3.

And only last year this Court, in *Bazemore v. Friday*, 106 S.Ct. 3000 (1986), strongly endorsed the use of statistical proof through regression analysis as valuable evidence in seeking to prove a Title VII pattern and practice case brought by professional employees in an academic setting. *Id.* at 3009.[3] However, further guidance by this Court as to the effective use and analysis of this evidence is needed in order to reverse the history of severely restricted remedies available to academic plaintiffs.

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[3] *Bazemore v. Friday*, 106 S. Ct. 3000 (1986), a Title VII class action case based on race discrimination, was brought by black professional employees against the North Carolina Agricultural Extension Service and various counties. Employee class ranged

II. The 9th Circuit decision which is the subject of this petition for writ of certiorari effectively emasculates statistical proofs as probative of pattern and practice discrimination in academia.

The central issue in *Penk v. Oregon State Board of Higher Education*, at the trial court and on appeal, has been the validity of statistical evidence presented by plaintiffs and in large part confirmed by defendant's statistical studies as well. That statistical evidence demonstrated a statistically significant wage, promotion and tenure "gap" between men and women faculty members in similar disciplines with the same levels of education and experience.

The trial court in *Penk* had before it regression analyses demonstrating disparities in wages and promotions between men and women faculty with similar objective qualifications. The central question became what weight to give this evidence in the face of criticisms by defendant that the statistical studies failed to take into account decision-making factors—subjective in nature, sometimes impossible to quantify and often completely unrecorded—which also went into decision-making in the Oregon State System of Higher Education.

The trial court admitted the statistical proof, but found its probative value to be severely undercut by the possibility that the variables which were omitted would, if included, account for the differences in treatment. It put no burden of production, much less persuasion on the defendants. The 9th Circuit Court of Appeals upheld the trial court's decision as essentially a matter of credibility: "The judge was simply unpersuaded." *Penk*, 816 F.2d 458 (9th Cir. 1987).

The 9th Circuit argued that it was not error to discount statistics which, though they might effectively com-

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from local "agents" who implemented education programs on agriculture and home economics to County Chairmen with administrative responsibilities in these areas.

pare the objective qualifications of employees, do not completely "model" the decision-making process. *Penk, supra,* at 12-13. While this form of statistical evidence was not deemed inadmissible, the 9th Circuit determined it to be evidence with very little value. The trial court in *Penk* termed the proof—"fatally flawed." *Penk,* Civil No. 80-436FR, slip op. at 404-406 (D. Ore., February 15, 1985).

Yet the entire value of such statistics is to illuminate potential discrimination against a protected class over a large number of cases. If that is the purpose, one would expect the courts to require the defendants to produce evidence that the actual decision-making process is not biased. If the plaintiff is required to model all subjective factors—for example, collegial views that the candidate is "unpleasant" or "aggressive"—the statistics would reflect the very bias in question. Yet it is on this point that the courts appear confused.

Individual decisions about academic "merit" are rarely, if ever, given a review. The class action vehicle, utilizing statistics, is specifically aimed at eliminating the necessity of weighing the subjective judgments about merits of candidates.

Other circuits have examined regression analyses as proof of discrimination and come to a different conclusion. Before discounting plaintiff's regression analyses for omission of a variable, defendants have been required to make some demonstration that the omitted variable would, in fact, eliminate the disparity shown. *Segar v. Smith,* 738 F.2d 1249 (D.C. Cir. 1984), *Trout v. Lehman,* 702 F.2d 1094 (D.C. Cir. 1983).[4] Plaintiffs in these cases were not required to reproduce exactly the decision-making of the employer—which would, after all, mean reproducing any discrimination which had infected the

[4] *Segar v. Smith,* 738 F.2d 1249 (D.C. Cir. 1984) was a Title VII class action case involving professional level employees called "spe-

process. Moreover, the 1st Cir. in *EEOC v. McCarthy*, 768 F.2d 1 (1st Cir. 1985) found discrimination solely on the basis of a regression analysis using fewer variables than were used in *Penk*.

In fact, this Court in *Bazemore* specifically criticized a trial court for accepting an employer defense made up entirely of pointing out omitted variables *without establishing in any way that if these factors were accounted for, the disparities would disappear.* 106 S.Ct. 3000 at 3010.[5] If defendants had no greater burden, academic plaintiffs would be left with an unacceptable *presumption* that subjective factors of "merit" will weigh against the protected class. *Teamsters v. U.S.*, 431 U.S. 324 (1977),

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cial agents" employed by the U.S. Drug Enforcement Agency. Special agents ranged from GS 7 and 9 through GS 12 and above. Here defendant employer attacked plaintiffs' regression analysis for failing to account for a crucial variable. The Appellate Court affirmed the lower court's ruling that defendant had to do more than cast doubt on its proof and had to "at least make a 'clear and reasonably specific showing,' based on admissible evidence, that the alleged nondiscriminatory explanation in fact explain[ed] the disparity." *Id.* at 1269, quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) at 253-255.

Trout v. Lehman, 702 F.2d 1094 (D.C. Cir. 1983) was a Title VII case against the U.S. Navy brought by both individuals and a class of female professional technical employees in the computer science field. Here the Navy attacked plaintiffs' regression analysis for, again, omitting critical variables related to minimum objective qualifications for positions. Noting that plaintiff need not "present a perfect statistical analysis" to prevail at the prima facie stage, the Court held that defendants had failed either by their own statistical proofs or by reworking plaintiffs' statistics with the omitted factors to explain the disparity. *Id.* at 1101-1102.

[5] In *Bazemore*, 106 S.Ct. 3000 (1986), the lower court held petitioners' regression analyses "unacceptable as evidence of discrimination" because they did not include "all measurable variables thought to have an effect on salary level." *Id.* at 3009. The Supreme Court overruled this finding for, among other factors, the employers' failure to demonstrate that when these factors were properly organized and accounted for, the disputed disparity becomes insignificant. *Id.* at 3010, note 14.

Neal v. Delaware, 103 U.S. 370 (1880). *Penk* leaves plaintiffs with no real possibility of establishing discrimination absent direct proof of invidious intent or without once again resorting to arguments about individual merits which courts are loath to review. What is more troublesome is that despite *Bazemore* real confusion remains concerning the proper treatment of these statistics in a Title VII academic discrimination case.

CONCLUSION

Courts and plaintiffs are in need of guidance as to the appropriate means of proving a case of discrimination in an academic context. Congress sought to protect faculty members from discrimination in the same manner as other employees. Courts must have appropriate tools for fair and effective enforcement. For these reasons, *amici* assert that the time is ripe for this Court to grant the petition for certiorari and to establish the appropriate rules for academic plaintiffs attempting to establish a prima facie case of discrimination under Title VII.

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